

19 October 2016

BY POST:

The Registry
European Court of Human Rights
Council of Europe
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Dear Ms Tsirli

Amanda KOSA v Hungary – Application Number 53461/15 (“KOSA Matter”): Written Submissions

INTRODUCTION

1. The Legal Resources Centre (“**LRC**”) is one of South Africa’s oldest public interest law firms, focussing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. In this regard, the LRC’s clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist them in claiming their fundamental economic, social and environmental rights. We have been doing so since 1979.
2. More recently, we have expanded the reach of our work and now aim to have broader geographic impact. The knowledge and

understanding which we gain from our work is shared locally, regionally and internationally to develop policy and law to advance human rights implementation. The LRC seeks to increase our participation in regional and international human rights fora to bring a South African voice to the struggle for the rights of vulnerable and marginalised people globally.

3. The European Court of Human Rights has set out three questions for consideration by the parties to the KOSA Matter. The LRC does not make submissions regarding the specific facts or merits of the case. The LRC confines its submissions to the general principles that relate to the third question, which reads as follows:

“3. Has the applicant been denied the right to education, guaranteed by Article 2 of Protocol No. 1, on account of the termination of the bus service connecting the applicant’s neighbourhood with a school providing integrated education for children from various social backgrounds?”

4. The question whether the provision of State-funded transportation, to underprivileged learners living far away from their nearest schools, should be considered necessary for the fulfilment of the right to basic education has arisen in litigation in South Africa.
5. It is submitted that the approach of the South African High Court, which relied on international law, is instructive in considering whether as a general principle the right to education under the European Convention on Human Rights (“**Convention**”) includes, in appropriate circumstances, an obligation on States to provide transport to enable children to attend school.

CONTENT OF THE RIGHT TO BASIC EDUCATION

6. The right to a basic education in the South African Constitution reads as follows:

“Everyone has the right to a basic education, including adult basic education.”¹

7. This right is framed to refer specifically to “basic” education, so as to distinguish it from “further” or tertiary education, which is treated differently in the text of the Constitution.
8. A central component of the right to basic education, as provided for in the South African Constitution, is the State’s duty to ensure access to schools. Our Constitutional (and highest) Court has ruled on this expressly, saying -

“...basic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to basic education ... - is a necessary condition for the achievement of this right.”²

9. In subsequent cases, the South African courts have given content to the right to a basic education, having particular regard to international human rights law.
10. In a case concerning the provision of textbooks, the High Court in South Africa held that –

¹ Constitution of the Republic of South Africa, section 29(1)(a).

² *Governing Body of the Juma Masjid Primary School and others v Essay N.O. and others* 2011 (8) BCLR 761 (CC) para 37.

*“[m]ost societies, ours included, place a high premium on education. Not only is it the means by which individuals are able to fulfil their potential, it also provides in a wider sense the basis for development and upliftment. Accordingly, in the context of international human rights law, and increasingly in the context of national legal systems, it is not a privilege but a right, creating with it duties and obligations and where the right is violated, activating the need to craft appropriate remedies.”*³

11. The High Court specifically referred to the right to education as provided for in article 13 of the International Covenant on Economic, Social and Cultural Rights and as further interpreted in General Comment 13 of the Committee on Economic, Social and Cultural Rights.⁴
12. Regarding the content of the right to education, interpreted in the context of international human rights law, the High Court held that the right to basic education, *“in order to be meaningful, [should] include such issues as infrastructure, learner transport, security at schools, nutrition and related matters.”* (emphasis added)⁵
13. In 2015, the LRC represented school children in *Tripartite Steering Committee v Minister of Basic Education*, a test case before the High Court concerning the specific question whether the provision

³ *Section 27 & Two Others v Minister of Basic Education* 2013 (2) SA 40 (GNP) para 1.

⁴ *Section 27 & Two Others v Minister of Basic Education* 2013 (2) SA 40 (GNP) para 4. We note that Hungary is a party to the International Covenant on Economic, Social and Cultural Rights,

⁵ *Section 27 & Two Others v Minister of Basic Education* 2013 (2) SA 40 (GNP) para 22. The European Court of Human Rights has ruled, in the case of *Catan and Others v. the Republic of Moldova and Russia* [GC] at para 136, that when interpreting and applying Article 2 of Protocol No. 1 of the Convention (that is, the education right), account must be taken of any relevant rules and principles of international law and the Convention should, so far as possible, be interpreted in harmony with other rules of international law. This Court mentions article 13 of the International Covenant on Economic, Social and Cultural Rights as specifically relevant for interpreting Article 2 of Protocol No. 1 of the Convention (see para 79).

of learner transport in appropriate circumstances forms part of the right to a basic education.

14. The High Court approved the passage from the *Section 27* judgment referred to above (which had drawn on international law to reach its conclusions) and confirmed that -

*“The right to education is meaningless without ... transport to and from school at State expense in appropriate cases. Put differently, in instances where scholars’ access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations... to promote and fulfil the right to basic education”.*⁶

15. Accordingly, under the South African Constitution, in appropriate cases, the State must provide transportation to learners, to ensure those learners’ rights to basic education are not infringed.
16. This legal obligation arises for two main reasons:
 - 16.1. First, if transportation is not provided, it is impossible for learners to exercise their right to access to basic education fully, or at all.
 - 16.2. Second, in the context of a history of discrimination, the failure to provide scholar transport perpetuates inequality in education for vulnerable and marginalised groups.
 - 16.3. Each of these reasons is explored further below.

⁶ See *Tripartite Steering Committee and another v Minister of Basic Education and others* 2015 (5) SA 107 (ECG).

ACCESS TO EDUCATION MAY REQUIRE SCHOLAR TRANSPORT

17. Access to education necessarily includes the State's duty to ensure that safe transport to school is provided for learners who require it. Without the means to travel safely to and from school, learners are deprived of their right to basic education.
18. The evidence of the truth of this statement is stark, particularly in the rural areas and townships of the Eastern Cape - a province in which much of our work takes place. Here, thousands of learners walk 10km to and from school, because they have no alternative forms of transport. Many learners walk much further. Often, this leads to students missing days of school, dropping out of school, as well as being victims of criminal acts during their daily commute on foot.
19. Put simply, it is clear that in South Africa, a lack of free scholar transportation for deserving learners impacts severely and directly on learners' education.
20. Although the LRC's experience relates to the South African context, it is submitted that as a general principle the right of access to education may require a State to provide transport to enable learners to travel to and from appropriate schools.

FAILURE TO PROVIDE SCHOLAR TRANSPORT PERPETUATES INEQUALITY

21. The South African education system exists in a context of deep economic and social inequality – *“a painful legacy of our apartheid*

history”.⁷ While this manifests in many aspects of our society, it is particularly stark and tragic in the realm of basic education.

22. Our Constitutional court has recently explained the root cause of continuing inequality in basic education:

*“It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.”*⁸

23. In order to address some of these ills, our Constitution makes a commitment to creating a society that is not only formally equal, but also substantively equal. Substantive equality requires that the State take positive action to ensure equality of outcome of its conduct/laws/policies, rather than equality of treatment of people at face value. Put succinctly, our Constitutional Court has stated that -

“...our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than

⁷ *Head of Mpumalanga Department of Education and another v Hoerskool Ermelo and others* 2010 (3) BCLR 177 (CC) para 2.

⁸ As above para 46

that The effects of discrimination may continue indefinitely unless there is a commitment to end it".⁹

24. Our Constitutional Court has also held that "*education is the engine of any society. And therefore, an unequal access to education entrenches historical inequality as it perpetuates socio-economic disadvantage*".¹⁰
25. In order to reverse this perpetuation, it is necessary to break the cycle of poverty that entrenches patterns of class and racial inequality from generation to generation.
26. Our experience has been that the effects and dangers of a lack of scholar transportation affect most seriously predominantly poor black children, living in rural South Africa. To fail to acknowledge this would be to understand the legal framework for learner transport provision in a manner that perpetuates rather than alleviates historical discrimination.
27. It has therefore been necessary for our courts to understand the right to basic education as operating in this context. In order to fulfil their constitutional obligations to advance substantive equality, our courts must give content to rights, particularly the right to basic education in a way that seeks to alleviate historical discrimination. This imperative has led to the finding set out above - the provision of learner State-funded transportation, in appropriate cases, is undoubtedly an aspect of the right to basic education.
28. We submit that our Constitutional Court has adopted the correct method for determining the content of rights, and in particular, the right to basic education.

⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) para 74

¹⁰ As above para 2.

29. In order to ensure that those most in need of the protection of rights receive such protection, it is necessary to take cognisance of the historical context in which their exercise takes place and to ensure that interpretation of their content does not inadvertently perpetuate injustice and unfair discrimination.
30. As a general principle, the denial of access to education is likely to perpetuate inequality and discrimination in any society in which particular groups are marginalised and vulnerable.

CONCLUSION

31. In South Africa, relying on international law, the courts have held that the right to basic education in section 29 of our Constitution requires the provision of State-funded learner transportation in appropriate cases. A failure by the State to provide this transportation is a denial of the right to basic education.
32. We submit that the provision of State-funded scholar transportation, in appropriate cases, is a necessary aspect of the fulfilment of any right to education.
33. This is particularly so when those claiming fulfilment a right to education have faced historical unfair discrimination and a denial of access to education would perpetuate this discrimination.

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